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DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

48 CFR Parts 436 and 452

RIN: 0599-AA21

Agriculture Acquisition Regulation, Fire Suspension Suppression and Liability

AGENCY: Office of Procurement and Property Management, Department of Agriculture.ACTION: Interim Rule.

SUMMARY: The Office of Procurement and Property Management (OPPM) of the Department of Agriculture (USDA) amends the Agriculture Acquisition Regulation (the “AGAR”) by adding a new clause entitled “Fire Suppression and Liability.”

Section 8205 of the Agricultural Act of 2014 (2014 Act) provided the USDA Forest Service with permanent authority for stewardship end results contracting by adding a new section 604 to the Healthy Forests Restoration Act of 2003. Section 8205 contains a requirement that the agency use a fire liability provision in all stewardship contracts and agreements that is in substantially the same form as the fire liability provisions contained in the integrated resource timber contract in Forest Service contract numbered 2400-13, part H, section H.4. This interim rule establishes a new clause in the AGAR, the USDA supplement to the Federal Acquisition Regulation (FAR), for use in Integrated Resource Service Contracts (IRSC) subject to the FAR. This new AGAR clause addresses fire liability on stewardship contracts as required in the 2014 Agricultural Act.

DATES: This interim rule is effective [Insert date of publication in the **Federal Register**]. Interested parties should submit written comments on this interim rule, to the Department of Agriculture before [Insert 30 days from the date of publication in the **Federal Register**] to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified in the subject line as “48 CFR 436 Interim Rule” by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: Procurement.policy@usda.gov.
- Mail: Office of Procurement and Property Management, Procurement Policy Division, MAIL STOP 9306, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250-9303.
- Hand Delivery/Courier: Procurement Policy Division, Room **262**, Reporters’ Building, 300 7th Street SW, Washington, DC 20025.

INSTRUCTIONS: All submissions must be identified as “48 CFR 436 Interim Rule” for this rulemaking. Please include your name, company name (if applicable), email address and/or phone number where you can be contacted if additional clarification is required regarding your comment(s).

FOR FURTHER INFORMATION CONTACT: Please contact Curt Brown, Office of Procurement and Property Management, by telephone at (202) 720-0840, by email at Curt.Brown@dm.usda.gov, or by mail at OPPM, MAIL STOP 9304 - U.S. Department of Agriculture - 1400 Independence Avenue, S.W., Washington, DC 20250-9303. Please cite “48 CFR 436 (Interim Rule)” in all correspondence.

Individuals who use telecommunication devices for the deaf may call the Federal Information Relay Service at 800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Daylight Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

I. Background

Beginning in 1998 with the enactment of section 347 of the Department of the Interior and Related Agencies Appropriation Act, 1999, the Forest Service has been authorized to carry out Stewardship End Results Contracting Projects; first on a pilot basis and then, through a succession of subsequent amendments, this authority was expanded. The enactment of Section 8205 of the Agricultural Act of 2014 sets forth the permanent authority for the conduct of Stewardship End Resulting Contracting Projects by adding a new section 604 to the Healthy Forests Restoration Act of 2003. Section 8205 contains a provision that “not later than 90 days after the date of enactment of this section, the Chief and the Director shall issue for use in all contracts and agreements under this section fire liability provisions that are in substantially the same form as the fire liability provisions contained in— (A) integrated resource timber contracts, as described in the Forest Service contract numbered 2400–13, part H, section H.4; and (B) timber sale contracts conducted pursuant to section 14 of the National Forest Management Act of 1976 (16 U.S.C. 472a).”

This interim rule establishes a new AGAR clause for use in stewardship contracts subject to the FAR. This clause addresses fire liability on stewardship end results contracts as required in the 2014 Agricultural Act. The text of the clause is closely specified in the law. Therefore, it has been determined that this rule should become effective upon publication. However, comments are requested with regard to the interim rule.

2. Regulatory Certifications

Regulatory Flexibility Act

USDA certifies that this proposed rule will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. There is no additional submission required as a result of this action. The rule will not have a significant impact on the small business community or on a substantial number of small businesses. The Department invites comment on its estimates for the potential impact of this rulemaking on small businesses.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed rule does not impose any record keeping or information collection requirements that require approval by the Office of Management and Budget.

Environmental Impact

The USDA has determined that this interim rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

This interim rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this is not a significant rule. This rule would not have an annual effect of \$100 million or more on the economy, nor would it adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments. This interim rule would not interfere with an action taken or planned by another agency, nor raise new legal or policy issues. Finally, this interim rule would not alter

the budgetary impact of entitlement, grant, user fee, or loan programs or the rights and obligations of beneficiaries of such programs. Accordingly, this interim rule is not subject to Office of Management and Budget (OMB) review under Executive Order (E.O.) 12866.

No Takings Implications

The USDA has analyzed this interim rule in accordance with the principles and criteria contained in E.O. 12630 and determined that the rule would not pose the risk of a taking of private property.

Civil Justice Reform Act

The USDA has reviewed this interim rule under E.O. 12778, Civil Justice Reform. Under this rule, (1) all State and local laws and regulations that conflict with this rule or that impede its full implementation would be preempted; (2) no retroactive effect would be given to this interim rule; and (3) it would require administrative proceedings before parties may file suit in court challenging its provisions.

Federalism and Consultation and Coordination with Indian Tribal Governments

The USDA has considered this interim rule under the requirements of E.O. 13132 on federalism and has determined that this rule conforms to the federalism principles in the E.O. The rule would not impose any compliance costs on the States; and would not have any substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Moreover, this interim rule does not have tribal implications as defined by E.O. 13175, Consultation and Coordination with Indian Tribal Governments, and therefore advance consultation with tribes is not required.

Energy Effects

The USDA has reviewed this interim rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or use and has determined that this rule would not constitute a significant energy action as defined in the E.O.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the USDA assessed the effects of this interim rule on State, local, and tribal governments and the private sector. This rule would not compel the expenditure of \$100 million, or more by any State, local, or tribal government, or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

List of Subjects in 48 CFR Parts 436 and 452

Government Procurement.

For the reasons set forth in the preamble, the Department of Agriculture amends 48 CFR Chapter 4, in the following manner:

PART 436—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

1. The authority citation for part 436 continues to read as follows:

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 436.5 – Contract Clauses

2. Section 436.578 is added to read as follows:

436.578 **Contract clause.**

Insert the clause at [452.236-78](#), *Fire Suppression and Liability*, as applicable, in solicitations and contracts for Integrated Resource Service Contracts (IRSC) awarded for the Forest Service.

PART 452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority citation for part 452 continues to read as follows:

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

4. Section 452.236-78 is added to read as follows:

452.236-78 - Fire Suppression and Liability.

As prescribed in §436.578, the following clause may be inserted in contracts awarded for Integrated Resource Service Contracts (IRSC) awarded for the Forest Service.

Fire Suppression and Liability (May 2014)

(a) Contractor's Responsibility for Fire Fighting. The Contractor, under the provisions of FAR clause 52.236-9, *Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements*, shall immediately extinguish all fires on the work site other than those fires in use as a part of the work. The Contractor may be held liable for all damages and for all costs incurred by the Government for labor, subsistence, equipment, supplies, and transportation deemed necessary to control or suppress a fire set or caused by the Contractor or the Contractor's agents or employees subject to the following fire classifications:

(b) Fire Suppression Costs. The Contractor's obligations for cost of fire suppression vary according to three classifications of fires as follows:

(1) Operations Fire. An "operations fire" is a fire caused by the Contractor's operations other than a negligent Fire. The Contractor agrees to reimburse Forest

Service for such cost for each operations fire, subject to a maximum of the dollar amount of \$ /Contracting Officer insert amount/. The cost of the Contractor's actions, supplies, and equipment on any such fire, or otherwise provided at the request of Forest Service, shall be credited toward such maximum. If the Contractor's actual cost exceeds contractor's obligation stated above, Forest Service shall reimburse the contractor for the excess.

(2) Negligent Fire. A "negligent fire" is a fire caused by the negligence or fault of the Contractor's operations including, but not limited to, one caused by smoking by persons engaged in the Contractor's operations during the course of their employment, or during rest or lunch periods; or if the Contractor's failure to comply with requirements under this contract results in a fire starting, or permits a fire to spread. Damages and the cost of suppressing negligent fires shall be borne by the Contractor.

(3) Other Fires on Contract Area. Forest Service shall pay the Contractor, at firefighting rates common in the area or at prior agreed rates, for equipment or personnel furnished by the Contractor at the request of Forest Service, on any fire on contract area other than an operations fire or a negligent fire.

(c) Contractor's Responsibility for Notification in Case of Fire. The Contractor shall immediately notify the Government of any fires sighted on or in the vicinity of the work site.

(d) Contractor's Responsibility for Responding to Emergencies. When directed by the Contracting Officer, the Contractor shall temporarily redirect employees and equipment from the work site for emergency work (anticipated to be restricted to firefighting). This is considered to

be within the general scope of the contract. An equitable adjustment for any such redirection of employees and equipment will be made under the CHANGES clause, FAR 52.243-4.

(e) Performance by the Contractor. Where the Contractor's employees, agents, contractors, subcontractors, or their employees or agents perform the Contractor's operations in connection with fire responsibilities, the Contractor's obligations shall be the same as if performance was by Contractor.

(f) State Law. The Contractor shall not be relieved by the terms of this contract of any liability to the United States for fire suppression costs recovered in an action based on State law, except for such costs resulting from operations fires. Amounts due to the Contractor for firefighting expenditures on operations fires shall not be withheld pending settlement of any such claim or action based on State law.

(End of Clause)

Dated: May 15, 2014

Lisa M. Wilusz
Director, Office of Procurement and Property Management

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